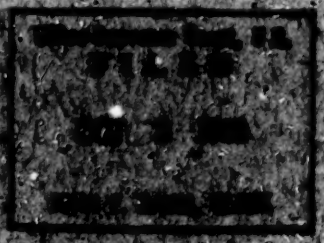

No. [illegible]

In the Supreme Court of the United States

October Term, 1965

IN RE PETITION OF A. J. H. TRANSPORTATION, INC.,

Petitioner

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 440

IN RE PETITION OF A. & H. TRANSPORTATION, INC.,
PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals and the district court have not yet been officially reported but are reprinted in Appendices B and C of the petition (Pet. 3a–7a).

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1963. The petition for a writ of certiorari was filed on September 5, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a writ of mandamus should issue to order a district court to summon a special grand jury to

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investigate violations of the antitrust laws alleged in general terms by petitioner.

STATUTES INVOLVED

Rule 6(a) of the Rules of Criminal Procedure is printed in Appendix A to the petition (Pet. 1a).

STATEMENT

Commencing in June 1962, petitioner's president, Harry Waller, wrote four letters (Pet. 7a, 9a, 13a, 14a) to the foreman of a grand jury then sitting in Baltimore, Maryland, requesting that he be called to testify regarding his allegations of violations of the antitrust laws by major oil companies. Mr. Waller was assured by the United States Attorney that his charges would be investigated (Pet. 8a) and was informed by the foreman that the grand jury had initiated prompt action to consider the matter (Pet. 14a).

In April 1963, A. & H. Transportation, Inc., petitioned the District Court for the District of Maryland to empanel a special grand jury to investigate similar asserted violations of the antitrust laws, stating that, although complaints had been made to the Department of Justice, the practices were continuing and were causing injury to petitioner (Pet. 6a). After reviewing these facts, Chief Judge Thomsen, with concurrences by Judges Watkins, Northrop and Winter, declined to summon a special grand jury (Pet. 5a–7a). The court noted petitioner's right under Section 4 of the Clayton Act (15 U.S.C. 15)

to proceed with its own action for violations of the antitrust laws.[1]

Petitioner, appearing by its president, pro se, then filed a "Notice of Appeal to Court of Appeals under Rule 73(b)." The court treated the notice "as a petition for a writ of mandamus to require the District Court of Maryland to convene a special grand jury and require it to conduct the kind of investigation the petitioner seeks" (Pet. 4a). After reviewing the history of petitioner's experiences with the various governmental authorities, as well as the matters alleged in its petition, the court dismissed the petition, holding that the district court had not abused its discretionary authority in refusing to convene a special grand jury.

ARGUMENT

The courts below correctly held that authority to convene a grand jury is vested in the sound discretion of the district court, that mandamus, as an extraordinary remedy, will issue only to correct serious abuses of that court's discretion, and that no such abuse occurred here. The petition presents no substantial question warranting review by this Court.

1. The issue on which petitioner, a corporation, now seeks review—whether it has a right to appear before a grand jury—was neither raised nor decided in the courts below. Contrary to the implication of the "Question Presented" in its petition (Pet. 2), peti-

[1] The court also noted (Pet. 6a) that one of Mr. Waller's corporations had instituted an action against Shell Oil Co. and lost. *Seven Gas Stations, Inc.* v. *Shell Oil Co.*, 203 F. Supp. 529 (D. Md.), affirmed, 309 F. 2d 306 (C.A. 4).

tioner never sought vindication of "a right * * * to appear before" a grand jury.

As the opinions below state, petitioner sought only to have a special grand jury called for the purpose of investigating its charges of widespread violations of the antitrust laws in the petroleum industry (Pet. 3a–6a). Indeed, petitioner's aim has been to force a grand jury to be called which would follow a plan of investigation shaped by petitioner, not simply to present its grievance, which had already been urged to virtually every interested government agency. Accordingly, there is no support in the record for its argument that the case presents an issue as to the right of a victim of a conspiracy "to appear before a federal Grand Jury in order to bring to its attention the commission of the crime" (Pet. 6).[2]

2. The issue decided by the courts below, whether mandamus should issue to require a district court to summon a special grand jury in the circumstances of the case, presents no question warranting review by this Court. The authority of the district court to summon and discharge grand juries (Rule 6, F.R. Crim. P.) is a broadly discretionary power to be exercised as the public interest may require. See, *Mc-*

[2] Petitioner's president, Mr. Waller, had vigorously pressed his complaints with a Congressional investigating committee, the Department of Justice and the grand jury. He had been assured by the grand jury foreman that the grand jury was pursuing the matter concerning which he had complained (Pet. 14a).

Dowell v. *United States*, 159 U.S. 596, 602.[3] The Court of Appeals for the Fifth Circuit, construing the statute which preceded Rule 6,[4] aptly summarized the authority of the district court (*Morris* v. *United States*, 128 F. 2d 912, 915, certiorari denied *sub nom. Lacy* v. *United States*, 317 U.S. 661):

> In short, the provision on which appellant relies merely negatives the power of others than a district judge, to draw a grand jury, and the statute as a whole, in terms confirms the implications of its first sentence that no one but a judge of a district court can draw a grand jury, and it is for him to say when and for what time grand juries may be drawn.

It is well settled that a writ of mandamus will not issue to a lower court except for a serious abuse of that court's discretion, and that this drastic remedy

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[3] Rule 6(a) provides in part: "The court shall order one or more grand juries to be summoned at such times as the public interest requires." The Notes of the Advisory Committee on Rules (Notes following 18 U.S.C., Rule 6) state that "The first sentence of this rule vests in the court full discretion as to the number of grand juries to be summoned and as to the times when they should be convened."

[4] Section 284 of the Judicial Code, 36 Stat. 1165, as amended, 28 U.S.C. (1940 ed.) 421, provided in part:

"No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor * * *. The district court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. * * *"

See Longsdorf, *The Beginnings and Background of Federal Criminal Procedure*, included in 4 Barron, *Federal Practice and Procedure*: 11 *Cyclopedia of Federal Procedure* (3d ed. 1952), § 41.16.

is reserved for extreme and unusual cases. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383. The same standard applies where the convening of a grand jury is in issue. See *In re Texas Co.*, 201 F. 2d 177 (C.A.D.C.), certiorari denied, 344 U.S. 904, where the court of appeals stated, "If any court has discretion to discharge this grand jury which is not shown to be ineligible * * * it is the District Court. We cannot invade any such discretion with the extraordinary writ of *mandamus*" (201 F. 2d at 179).

Petitioner has made no showing to warrant an appellate court's intercession here. Its petition to the district court presents only the broadest allegations, without supporting details or instances. For example, paragraph 5 contends that major oil producers in the Maryland area "are now engaged in an unlawful combination and conspiracy * * * to monopolize and attempt to monopolize the marketing of refined petroleum products"; that they "are selling gasoline, at retail, through their dealers and their affiliated (*sic*), at a price less than cost to the aforesaid dealers"; and that they "have entered into various agreements, understandings and arrangements among themselves and have done various things and performed various acts, including discrimination on certain price charges, granting freight allowances and granting protection allowances to its outlets and dealers and implementing the 'price war' conditions."

Such general allegations are clearly insufficient to warrant an appellate court's interference with the

broad discretion vested in the district court. See, *In re Petition for Special Grand Jury*, 50 F. 2d 973 (M.D. Pa.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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